Supreme Court, U.S.
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No. 96-39

In The

Supreme Court of the United States

October Term, 1995

INTEROCEANICA CORPORATION, TURBANA CORP., M/V POTOMAC, her engines, boilers, tackle, etc., *in rem*, M/V POCAHONTAS, her engines, boilers, tackle, etc., *in rem*, and M/V POCANTICO, her engines, boilers, tackle, etc., *in rem*,

Petitioners,

vs.

MICHAEL BALL, C.A. MASSEY, D.J. McINERNEY and T.J. KNIERIM,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Did the State of New York violate the Boundary Waters Act, 46 U.S.C. § 8501(b), when it amended § 89-b(1) of New York's Navigation Law limiting pilotage on New York territorial waters to pilots licensed by the State of New York?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents request that the Court deny the petition for a writ of certiorari seeking review of a decision of the United States Court of Appeals for the Second Circuit. The Court of Appeals Opinion is reported at 71 F.3d 73 (2nd Cir. 1995). (Pet. App. 3a-11a). (For the convenience of the Court, all citations to the district court and appellate court opinions will be to the rulings attached as Appendix A to the petition.)

COUNTER-STATEMENT OF THE CASE

Respondents, New York State licensed pilots commenced this action in the United States District Court, Southern District of New York against the Petitioners to recover pilotage fees for the pilotage of vessels in the western portion of Long Island Sound, specifically in the area of Long Island Sound west of a line running southeasterly from the mouth of the Byram River at the New York-Connecticut border to Oak Neck Port on Long Island. (Pet. App. 33a). The pilotage fees sought here covered vessel movements after the passage of the amendment to § 89-b of New York's Navigation Law in 1991.

In November, 1991 New York's Navigation Law § 89-b was amended to require that all foreign flag vessels and all American vessels under register must utilize the services of a licensed New York Long Island Sound pilot in waters west of the Byram River Line which are New York territorial waters. A review of the geographic area makes it absolutely clear that the water involved, west of the Byram

River Line, was not a boundary water between New York and Connecticut, but rather waters exclusively within the State of New York. The purpose and effect of the amendment to § 89-b was to improve the safety of navigation and protect the environment in New York waters. On the other hand, Petitioners assert incorrectly that the exclusive area for New York pilots was extended to gain economic benefits and substantially increase pilotage rates. However, the amendment did not extend the New York exclusive pilotage area nor did it result in increased pilotage rates. The amendment, which was designed both to insure a safe place for a pilot to transfer the helm, also serves to delineate the boundary waters of Long Island Sound from the New York territorial waters of Long Island Sound.

Petitioners do not deny that they refused the services of the Sound Pilots but instead take the position, among others, that the amendment to § 89-b was contrary to the Federal Boundary Waters Act, 46 U.S.C. § 8501(b). ("**ACT**") Petitioners' general assertion that Long Island Sound is a boundary water without distinguishing where it in fact is a boundary water and where it does not serve as a boundary between New York and Connecticut ignores the realities existing. It is clear when viewing a nautical chart that waters **east** of the Byram River Line serve as a boundary between New York and Connecticut and are waters in which both states have concurrent jurisdiction pursuant to the Act. The waters **west** of the Byram River Line are, however, wholly within the State of New York and are territorial waters of New York

which do not serve as a boundary between the states. (Pet. App. 33a).

REASONS FOR DENYING THE WRIT

I. PETITIONERS FAIL TO DEMONSTRATE THAT THE SECOND CIRCUIT COURT OF APPEAL'S INTERPRETATION OF THE FEDERAL BOUNDARY WATERS ACT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Petitioners principally claim that this Court should grant a writ of certiorari "so that this Court may consider the meaning and scope of the Boundary waters Act and whether New York's actions . . . comport with the Act." (Pet. 10) Petitioners do not call upon this Court to resolve any unsettled or conflicting decisions of this or any court. Instead, Petitioners request that this Court review an opinion by the Second Circuit Court of Appeals that comports with both an earlier decision of this Court, as well as other federal circuit courts. The petition should therefore be denied.

The Second Circuit affirmed the District Court's determination that the amendment to New York's Navigation Law § 89-b did not contravene the Act since the waterway in question i.e. the waters west of the Byram River Line, were not boundary waters but rather New York territorial waters. This decision is wholly consistent with this Court's prior interpretation of the Act in *Leech v. Louisiana*, 214 U.S. 175, 29 S.Ct. 553 (1909). In fact, the principles articulated by the District Court and affirmed

by the Second Circuit are wholly consistent with those interpretations made by other district and appellate courts that have been faced with a boundary water issue. *See, e.g., Warner v. Dunlap,* 532 F.2d 767 (1st Cir. 1976), *cert. dismissed,* 470 U.S. 1024 (1985); *Sweatt v. Florida Board of Pilot Commissioners,* 776 F.Supp. 1538 (M.D. Fla. 1991), *aff'd,* 985 F.2d 578 (11th Cir. 1993).

It is a well settled principle "that the limit of the waters referred to [in the Act] is the point at which they cease to be a boundary between two states" *Leech, supra,* at 178. In *The Glenearne,* 7 F. 604 (D.Or. 1881), the court held that pilots from either Washington State or Oregon could pilot the vessel up the Columbia River, but once the vessel entered the Willamet River bounded on both sides by the State of Oregon the vessel was no longer on boundary waters and only an Oregon pilot could pilot the vessel.

In *Leech, supra,* this Court interpreted the scope of boundary waters and the consequent application of the Act. In a decision analogous to the instant matter, this Court held that although part of the Mississippi River constitutes a boundary between Mississippi and Louisiana, New Orleans was exclusively within Louisiana and was therefor not boundary waters. Consequently, only a Louisiana State licensed pilot could bring a vessel into New Orleans. Justice Holmes stated in his clear and unequivocal opinion:

> " . . . that the limit of the waters referred to is the point at which they cease to be a boundary between two states. Neither continuity of water

> nor identity of name will carry them beyond that point."

Id., at 178.

Since this Court's interpretation of the Act over 90 years ago, numerous federal courts have interpreted the Act in a consistent manner. In *The Swift Arrow*, 292 F. 651 (D. Mass. 1923), the court observed that in order to be considered boundary waters they:

> "must be in a real and substantial way a boundary between different jurisdictions; ie. that the boundary must be based on the presence of such waters, and that they must have, to some extent, at least, the character of a monument on a boundary line." *Id.*, at 652.

Similarly, in *Warner v. Dunlap, supra*, the First Circuit held that a Connecticut license was not valid to traverse the waters of Rhode Island despite being en route to a Connecticut port. As the District Court in the instant matter observed, "*Warner* strongly affirmed the principle that each state has the right to regulate its territorial waters, and may prohibit pilotage on those waters by pilots it has not licensed." *Ball* (Pet. App. 29a). Even more recently in *Sweatt v. Florida Board of Pilot Commissioners*, 776 F.Supp. 1538 (M.D. Fla. 1991), *aff'd*, 985 F.2d 587 (11th Cir. 1993), the Eleventh Circuit held that the Act was inapplicable to a port situated on territorial waters of Florida despite the fact that access to the port was through boundary waters of Florida and Georgia. Likewise, in the instant matter, the Second Circuit preserved the State of New York's right to regulate its territorial waters. (Pet. App. 6a-7a).

An examination of federal case law, and in particular this Court's decision in *Leech*, reveals that the District Court's decision and the subsequent affirmance by the Second Circuit is consistent with the well settled principle that waters that do not form a natural boundary between two states are not boundary waters and are therefore under the exclusive jurisdiction of the state in which they are situated. Accordingly, the issue presented to this Court is not appropriate for Supreme Court review since its determination in the lower courts was consistent with and follows prior decisions of this Court, as well as other federal courts.

II. PETITIONERS FAIL TO DEMONSTRATE WHY THIS COURT SHOULD REVIEW ITS PRIOR INTERPRETATION OF THE BOUNDARY WATERS ACT.

Petitioners have likewise failed to demonstrate that this Court should re-evaluate its prior interpretation of the Boundary Waters Act and review the appellate Court's determination that New York's Navigation Law 89-b does not violate that Act. Petitioners' claim appears to rest on the belief that this Court should grant a writ of certiorari so that it may review the Act in light of what Petitioners see as the purpose behind the act. Petitioners' reliance on *Interport Pilots Agency, Inc. v. Sammis*, 14 F.3d 133, 136-137 (2nd Cir. 1994) to evidence congressional intent is misplaced. In *Sammis* the court stated *in dicta* that "[t]he boundary statute is succinct, intelligible and specific, however, and we have no call to consult legislative history." *Sammis, supra* at 136-137. Likewise, in *Leech*

this Court afforded the Act its plain meaning in determining what constitutes boundary waters. Petitioner has failed to demonstrate any plausible reason for having this Court reconsider the meaning and scope of the Act.

Petitioners have also failed to illustrate that the lower courts' analysis was incorrect in its interpretation of the Act. Despite petitioners' claim otherwise, New York did not "arbitrarily expand the exclusive pilotage zone for its pilots" (Pet. 6), rather New York defined the point at which the waters of the Long Island Sound cease to be a boundary between the two states. An examination of the geographic area makes it clear that the Byram River Line is a line in which all waters west of the line are solely New York territorial waters. As the District Court stated:

> "Because the Western Sound waters are New York territorial waters, as opposed to boundary waters, the provision of § 8501(b), requiring allowance for concurrent pilotage in boundary waters, does not apply. I conclude that the amended § 89-b is consonant with the Federal Act."

(Pet. App. 30a).

Having failed to demonstrate that the waters west of the Byram River Line are anything other than New York State territorial waters, Petitioners ask this Court to alter the standard upon which boundary waters are delineated. Petitioners have afforded no justification for this Court to review either the Act or the Second Circuit's interpretation of it.

CONCLUSION

Petitioners set forth no important or special reasons for this Court to consider. For the foregoing reasons, their Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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